Supreme Court, U.S.
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No. 03-841

IN THE

# Supreme Court of the United States

DONATO DALRYMPLE, *et al.*,

*Petitioners*,

v.

JANET RENO, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

## REPLY BRIEF FOR THE PETITIONERS

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## INTRODUCTION

The decision of the Eleventh Circuit in this case should not be allowed to stand because it would alter Petitioners' cause of action in a way that undermines the very purpose of a *Bivens* action[1] – to provide a remedy for a violation of federal rights – by imposing on Petitioners a heightened pleading requirement more stringent than provided under the Federal Rules of Civil Procedure ("Federal Rules"), in contravention of this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Review of this case is further warranted and necessary to resolve the conflict among the circuit courts of appeal on this important issue.

Respondents do not dispute that a conflict exists among the United States courts of appeals on the important question of law in this case, *i.e.*, whether, consistent with this Court's decision in *Crawford-El*, *supra*, a court may impose a heightened pleading requirement on the plaintiff in a civil rights lawsuit where the defendant is asserting a qualified immunity defense. *See* Resp. Br. in Opp. 6. They contend, nevertheless, that review of this case would be inappropriate for three reasons. First, they argue that Petitioners did not technically present and preserve their right to challenge the court of appeals' imposition of its unconstitutional heightened pleading requirement because Petitioners failed to raise the issue in a timely manner in their briefs below. Second, they argue that the facts of this case are unique or atypical merely because Petitioners brought this action solely against high-level, supervisory government officials who had pre-approved the actions that violated Petitioners' federal rights and not against the lower-

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[1] This action seeks to hold Respondents liable under *Bivens v. Six Unknown Named Narcotics Agents of the Federal Bureau of Narcotics*, 430 U.S. 388 (1971) for their roles in ordering the execution of the predawn raid that forcibly removed six-year-old Elian Gonzalez from the home of his Miami relatives and in ordering the use of excessive force against Petitioners who had gathered peacefully in public spaces and their own yards to converse, pray and express their views when the raid was executed.

level government enforcement agents who carried out those acts. Third, they contend, as a last resort, that the decision below is correct. *See* Resp. Br. in Opp. 8.

Respondents' arguments fail to pass muster. First, Petitioners did not waive their right to challenge the appellate court's imposition of a heightened pleading requirement, because the district court had found that Petitioners had properly pleaded their *Bivens* claims, Respondents never argued below for the imposition of such a "heightened pleading requirement," and the court of appeals blind-sided Petitioners by imposing a heightened pleading standard without requesting the parties to brief whether such a requirement was constitutional in light of the *Crawford-El* decision. In any event, Petitioners raised this issue at the earliest opportunity in their petition for rehearing and, thereby, did not waive this issue.

Second, the unconstitutional, heightened pleading requirement imposed by the court of appeals below is contrary to *Crawford-El*, *supra*, and, therefore, the decision is incorrect and must be reversed.

Third, this case is not an inappropriate vehicle for review merely because it involves a former high-level government official instead of a lower-level government official. Indeed, Respondents' suggestion (Resp. Br. in Opp. 10) that constitutional considerations might justify imposing a heightened pleading requirement in cases involving high-level government officials finds no support in *Crawford-El* or any other decisions of this Court. Finally, the capricious failure by the court of appeals to adhere to *Crawford-El* in reversing the district court below cries out for review in this socially and constitutionally important case.

## I. Review Is Warranted Because The Decision Below Improperly Imposes An Unconstitutional, Heightened Pleading Requirement On Petitioners Contrary To This Court's Decision In *Crawford-El*.

In reversing the district court below, the court of appeals erroneously imposed an unconstitutional, heightened pleading requirement on Petitioners. The appellate court's opinion states in pertinent part: "In examining the factual allegations of the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity. *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998)." Pet. App. 10. As the citation to the *GJR Investments* case indicates, the appellate court's "heightened pleading requirements" imposed a more stringent standard than the usual pleading requirements provided under Rule 8(a) of the Federal Rules.[2] The imposition of the heightened pleading requirement in this case is fundamentally at odds with this Court's decision in *Crawford-El*.

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[2] In *GJR Investments, supra*, the U.S. Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") stated: "However, while Fed.R.Civ.P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim." 132 F.2d at 1367. The court also emphasized: "We stress at this point, as we did in *Oladeinde*, *see* 963 F.2d at 1485, that the heightened pleading requirement is the law of this circuit...Although the Supreme Court has held that courts may not impose a heightened pleading requirement in § 1983 cases involving municipalities, *see Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163, 167-68, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517 (1993), the Court specifically declined to extend its holding to cases involving individual government officials, *see id.* at 167, 113 S. Ct. at 1162, and we likewise decline to do so here." *Id.* at 1368. After this Court's decision in *Crawford-El*, any prior distinction between the pleading requirements in civil rights actions against a municipality vis-à-vis an individual government official ceased to exist. This Court's decisions in *Leatherman, supra*, and *Crawford-El, supra*, make clear that, in any civil rights action, heightened pleading requirements more stringent than those provided under Fed. R. Civ. P. 8(a) are unconstitutional.

In *Crawford-El*, the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") had fashioned a special rule for constitutional claims based on improper motive by requiring a plaintiff to meet the clear and convincing burden of proof to survive summary judgment. Reversing the appellate court in *Crawford-El*, this Court stated, in pertinent part, as follows:

> Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs at either the summary judgment stage or in the trial itself...The unprecedented change made by the Court of Appeals in this case, however, lacks any common law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983 – to provide a remedy for the violation of federal rights.

*Crawford-El*, 523 U.S. at 594-95. Although *Crawford-El* held that federal courts may not impose a heightened burden of proof in civil rights actions brought under 42 U.S.C. § 1983, this Court's reasoning was much broader. In *Crawford-El*, this Court stated:

> In the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, or requiring pleadings of heightened specificity in cases alleging municipal liability...our cases demonstrate that questions regarding pleading, discovery and summary judgment are most frequently and most effectively resolved by the rulemaking process or the legislative process.

*Id.* at 595 (citations omitted). Thus, the reasoning of *Crawford-El* was sufficiently broad to apply directly to the instant case.

The *Crawford-El* decision is in complete harmony with this Court's prior decision in *Leatherman*, *supra*, where this Court, in a civil rights action against a municipality, struck down a heightened pleading requirement similar to the heightened pleading requirement in the instant case. In *Leatherman*, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") had applied a heightened pleading standard, similar to the heightened pleading standard imposed in the instant case, that required the plaintiff to state with factual detail and particularity the basis for the claim, including why the defendant could not maintain the defense of qualified immunity. *Leatherman*, 507 U.S. at 167. The *Leatherman* Court stated: "We think it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

The Court reasoned further that Rule 8(a) of the Federal Rules requires only " a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*; *see Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

This Court in *Leatherman* also noted that Rule 9(b) of the Federal Rules permits malice, intent, knowledge and other condition of mind of the defendant to be averred generally, without the special requirement of particularity essential to support a fraud claim. *Leatherman*, 507 U.S. at 168; Fed. R. Civ. P. 9(b).

In the case *sub judice,* the court of appeals held that Petitioners' allegations of a causal connection between Respondent Reno's supervisory actions in approving the specific acts of excessive force that violated Petitioners' rights and the alleged

constitutional violations by the enforcement agents on the scene who carried out those acts did not meet the "heightened pleading requirements" for civil rights cases involving qualified immunity. Pet. App. 13. Applying a pleading requirement more stringent than provided under the Federal Rules, the appellate court found Petitioners' factual allegations were insufficient because they "fail[ed] to allege that the detailed plan for the raid included spraying peaceful protesters, neighbors and passers-by with gas, beating them, detaining them at gunpoint, or threatening to shoot them." *Id.*

The court of appeals reached this incredible result notwithstanding that Petitioners specifically alleged that "[Respondent] Reno ordered the raid... despite **knowing and intending that**: (1) a strike force of 151 heavily-armed federal agents...would be unleashed on the Gonzalez family's home and neighborhood; (2) **peacefully assembled supporters would be sprayed with gas for having assembled and expressed their support for Elian and the Gonzalez family, and to prevent them from continuing to do so; and (3) neighbors, supporters and passers-by would be gassed, restrained, beaten, threatened and put in immediate fear for their lives and liberty**." Pet App. 12-13 (emphasis added). The appellate court's finding is even more untenable because Petitioners also alleged that: "the raid was a carefully-choreographed, pre-planned event, **the details of which [Reno] had fully approved**" and that "Reno admitted that the **only independent authority given to the federal agents on the scene was the precise timing of the raid.**" Pet. App. 13 (emphasis added). Petitioners also alleged that Respondent Reno's improper motive was evidenced by her admission after the raid that: "all objectives for Operation Reunion were met, with no significant injuries to either federal agents or bystanders and no fundamental changes to the approved plan." A fair reading of these allegations is that Respondent Reno knowingly approved a detailed plan that specifically called for and blessed the pre-ordained use of excessive force against Petitioners in violation of their

constitutional rights and that Respondent Reno confirmed after the raid that all the actions taken by the agents on the scene (including those that violated Petitioners' rights) were taken in accordance with the detailed plan she had approved. Contrary to the appellate court's finding, these factual allegations were neither vague nor conclusory as to causal connection or improper motive. While these allegations may not have met the Eleventh Circuit's unconstitutional "heightened pleading requirements," they met the requirements of the Federal Rules and were sufficient under the reasoning of *Crawford-El.* Accordingly, review of this erroneous decision is warranted and necessary.

## II. Review Is Warranted Because Petitioners Did Not Waive Their Right To Challenge The Court Of Appeals' Imposition Of An Unconstitutional, Heightened Pleading Requirement.

Respondents contend that Petitioners did not properly present or preserve their argument that the heightened pleading requirement applied by the court of appeals in this case is unconstitutional, because they failed to place in issue the appropriateness of the Eleventh Circuit's continued application of an unconstitutional heightened pleading requirement in civil rights cases. Respondents further assert that Petitioners' omission was a tactical litigation judgment, as Respondents argued below that the Eleventh Circuit's heightened pleading requirement was consistent with *Crawford-El. See* Resp. Br. in Opp. 6-7.

Respondents' argument is disingenuous for two reasons. First, because the district court found that Petitioners properly had pleaded their *Bivens* claims, a "heightened pleading requirement" did not become an issue on appeal until the court of appeals blind-sided Petitioners by imposing a heightened pleading standard *sua*

*sponte*. Petitioners preserved this issue by raising it at the earliest opportunity in their petition for rehearing *en banc*.[3]

Second, contrary to their assertion, Respondents never contended that the court of appeals should apply a "heightened pleading requirement." *See* Gov't C.A. Opening Br. 22, 32-34; Gov't Reply Br. 9-10. Indeed, Respondents' briefs below never mentioned the words "heightened pleading requirement." *Id.* Respondents never argued that the court of appeals should apply the heightened pleading standard rejected by this Court in *Leatherman*, *supra*, and applied by the court of appeals in *GJR Investments*, *supra*, and in this case.[4] Instead, Respondents merely argued that the court should adopt the standard endorsed by this Court in *Crawford-El*.[5] *Id.* Thus, contrary to their assertion, Respondents never placed in issue the "heightened pleading requirement" applied by the court of appeals here and Petitioners had no reason to anticipate that the court of appeals would not follow the governing law of *Crawford-El*.

## III. Review Is Warranted And Necessary To Resolve An Admitted Conflict Among The Circuits On This Important Issue.

Respondents concede, as they must, that a conflict exists among the circuits as to whether, consistent with *Crawford-El*, a

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[3] *United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996), *cert. denied*, 519 U.S. 1133 (1997), cited by Respondents, is inapposite because that case involves a failure to raise an error committed by the district court, not an error committed by the appellate court. *See* Resp. Br. In Opp. 7, n. 2.

[4] Although Respondents cited dicta from *GJR Investments*, *supra*, in their briefs, they did not argue that the court of appeals should apply in this case the same heightened pleading standard applied in *GJR Investments*.

[5] Respondents asserted that the court of appeals should require Petitioners to plead their claim of supervisory liability and improper motive with specific, non-conclusory factual allegations – a standard blessed by this Court in *Crawford-El*. *See* Gov't C.A. Opening Br. 21-22, 33-34; Gov't Reply Br. 9-10.

court may apply a heightened pleading standard more stringent than the Federal Rules in a civil rights lawsuit where the defendant is asserting a qualified immunity defense. *See* Resp. Br. in Opp. 8. This conflict is discussed at some length by Chief Judge Edwards in his concurring opinion in *Crawford-El v. Britton*, 93 F.3d 813, 851-52 (D.C. Cir. 1996) (Edwards, C.J., concurring in judgment) and by the Court of Appeals for the Tenth Circuit in *Currier v. Doran*, 242 F.3d 905, 913-15 (10th Cir. 2001). Given the existence of this circuit conflict, it is appropriate for this Court to resolve it with finality in this case.

Respondents further argue that this case is an inappropriate vehicle because the Eleventh Circuit has not yet determined the effect of *Crawford-El* on its heightened pleading requirement. This argument, however, incorrectly assumes that there is room for debate as to whether a heightened pleading requirement is permitted under *Crawford-El*. There is no exception under the *Crawford-El* reasoning for the imposition here of any pleading requirement more stringent than that provided under the Federal Rules. Furthermore, on review of this case, this Court may remand it back to the Eleventh Circuit for resolution of the constitutionality of its heightened pleading requirement in light of *Crawford-El*.

Finally, Respondents' suggestion that special considerations may justify a heightened pleading requirement in civil rights cases brought against high-level government officials is an unsupported invitation to undercut the broad application of *Crawford-El* and foster further conflict among the circuits on this important issue. Unless and until this circuit conflict is resolved, plaintiffs in civil rights actions will be held to differing pleading standards depending upon the circuit in which they file their actions. Allowing this circuit conflict to persist will foster unfairness in the circuits, such as the Eleventh Circuit, that impose a more stringent pleading standard than under the Federal Rules. Furthermore, if this Court refuses to enforce the rule of *Crawford-El* in this case, such refusal inevitably will lead to the gradual erosion of

*Crawford-El* and will create confusion among the circuits as to the meaning and scope of *Crawford-El*, thereby producing uncertainty as to the applicable pleading standard in civil rights cases.

## CONCLUSION

This Court should grant the petition and reverse the court of appeals' decision below and thereby resolve the conflict among the circuits by clarifying that a court may not impose on a plaintiff in a civil rights action a heightened pleading requirement more stringent than provided under the Federal Rules.

Respectfully submitted,

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